PRIVY COUNCIL REPORTS

JAMIL BIN HARUN v. YANG KAMSIAH & ANOR.

[P.C. (Lord Keith of Kinkel, Lord Edmund-Davies, Lord Scarman, Lord Roskill & Lord Templeman) January 11 & February 13, 1984]

[Privy Council Appeal No. 4 of 1983]

Torts – Negligence – Brain injury causing injured child to become subnormal – Damages – Itemization of damages – Loss of future earnings – Cost of future care – Interest on damages.

Damages – Brain damage causing injured child to become subnormal – Itemization of damages.

English Law – Whether courts in Malaysia may apply English cases – Persuasive authority.

This was an appeal from the decision of the Federal Court reported in [1981] 1 M.L.J. 292. The second respondent, Yang Salbiah, had been run down by a bus and as a result of the accident suffered very serious brain injury which turned her into a sub-normal child with permanent mental and physical disabilities. The trial judge ordered a global sum of $75,000/- as general damages with the "usual" interest of 6% on the general damages to run from the date of the accident. On appeal, the Federal Court rejected the trial judge's view that the trend of local authority was towards global award in cases of this sort.

The Federal Court held that it was necessary for the court in a personal injury case where there is an element of future loss or damage to itemise its award, that is, to make a separate assessment under each head of loss or damage. In this respect the Federal Court accepted the guidance of the House of Lords in the English case of *Lim Poh Choo* v. *Camden and Islington Area Health Authority*(3) and followed its previous decision in *Murtadza bin Mohamed Hassan* v. *Chong Swee Pian*(1)

The Federal Court itemised the damages under the headings as follows:–

(1) Pain, suffering and loss of amenities	$ 70,000
(2) Loss of future earnings	$ 33,816
(3) Cost of future care	$ 25,362
	$129,178

They awarded interest under the first head, but not under heads (2) and (3).

The appellant appealed. In the appeal counsel for the appellant criticised the judgment of the Federal Court which he said represented not the law of Malaysia but the law of England. Counsel also submitted –

(1) that as a matter of Malaysian law it was wrong to itemise an award of damages in personal injury cases;

(2) that in the case of an infant plaintiff loss of future earnings was too speculative to qualify for an award of damages and that such a loss should not, in Malaysian law, be accepted as recoverable; alternatively, that in the present case there was no evidence of any such loss;

(3) that there was no acceptable evidence of any need for nursing services or any paid care in the future.

Held: (1) it is for the courts in Malaysia to decide, subject always to the statute law of the Federation, whether to follow English law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the Courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so;

(2) though no statutory requirement exists in Malaysia for the itemization of damages in personal injury cases, the written law certainly does not forbid or prevent differentiation in the period or rate of interest as appropriate between the different heads of loss or damage suffered by a plaintiff. Nor does the written law forbid the Courts to adopt the itemization process in assessing damages. The courts of Malaysia are free to take their own course and the Federal Court was therefore not prevented by the written law of Malaysia from using the itemization process in the assessment of damages for personal injury;

(3) in upholding the right of the second respondent to damages for loss of future earnings capacity, the Federal Court accepted and applied the correct principles. If damages were to be a fair and adequate compensation for a plaintiff who is expected to live for many years during which time he will be unemployed or his earning capacity substantially reduced, it will be necessary to assess his future loss, difficult though the task may be in cases where the victim is a child. Though difficult, the court must do the best it can upon the evidence;

(4) the submission that the Federal Court was wrong to allow loss of future earnings into their assessment of the plaintiff's damages must be rejected. In the circumstances of this case the Federal Court had reached a reasonable estimate of the loss;

(5) the findings of the trial court in this case, fully justified as they were by medical evidence, strongly support the inference drawn by the Federal Court that there would be continuing need for care including nursing services. The Federal Court using its local knowledge estimated a reasonable figure in terms of current money; they applied an appropriate multiplier and gave effect to all necessary discounts;

(6) to conclude, the Federal Court was fully entitled in this case to accept the principles of assessment laid down by the House of Lords in *Lim Poh Choo's* case. The Federal Court was right in their view that the assessment of damages under separate heads is necessary in such a case as the present in order to achieve a fair and adequate compensation. The appeal should therefore be dismissed with costs.

Cases referred to:

(1) *Murtadza bin Mohamed Hassan* v. *Chong Swee Pian* [1980] 1 M.L.J. 216.

(2) *Cookson* v. *Knowles* [1979] A.C. 556.

(3) *Lim Poh Choo.* v. *Camden and Islington Area Health Authority* [1980] A.C. 174
(4) *Pickett* v. *British Rail Engineering Ltd.* [1980] A.C. 136.
(5) *Benham* v. *Gambling* [1941] A.C. 157.
(6) *Skelton* v. *Collins* (1966) 115 C.L.R. 94.
(7) *Tan Chwee Lian* v. *Lee Ban Soon* [1963] M.L.J. 149.
(8) *Croke* v. *Wiseman* [1981] 3 All E.R. 852.
(9) *Joyce* v. *Yeomans* [1981] 2 All E.R. 21.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

G. Sri Ram (*George Warr* with him) for the appellant.

Jonathan Harvie (*R.K. Nathan* with him) for the respondent.

Cur. Adv. Vult.

Lord Scarman (delivering the judgment of the Board): The issue in this appeal is as to the amount of general damages to be awarded to an infant plaintiff for personal injuries suffered in an accident for which the defendant admits liability.

On July 22, 1975 Yang Salbiah, then a little girl seven years old (she was born on May 10, 1968), was with her sister at Jalan Gombak, Batu 3¾, Setapak when the two of them were run down and injured by a motor bus driven by the defendant. Both girls, acting by their father as next friend, sued the driver, alleging that the accident was caused by his negligence. The writ was issued in the High Court on February 25, 1977. The sister (who was the first plaintiff), settled her claim at $1,000 general damages: her injuries were not serious. But Yang Salbiah had been gravely hurt. Before the accident she was a happy, normal, healthy and intelligent child. The accident completely changed her personality. According to a report obtained from her school she was after the accident unable to absorb anything that she was taught: she was "not responsive to anything". The medical evidence was undisputed: She had suffered irreversible brain damage, but her injuries were not such as to prevent her living a normal span of life. Dr. Bala Ratnam, a consultant neuro-physician, was consulted in June 1979 with a view to preparing a medical report. He diagnosed severe traumatic cerebral damage. The girl was mentally retarded, unable to control her bladder and bowel functions. He concluded that her disability was permanent and that she would be a liability to her family for the rest of her life; for she would be unable to complete her basic education or learn a useful self-supporting trade.

The trial was on October 18, 1979. Dr. Bala Ratnam was the only witness called by the plaintiff. The defendant called no evidence. There was, however, an agreed statement of facts and a Bundle of Agreed Documents, which included a written report from the school describing with a tragic vividness the difference wrought in this little girl by her accident. The failure to call any witness as to her family background, social circumstances or plans for her upbringing and continuing care has had the inevitable result that the trial judge and, on appeal, the Federal Court have had to make do with inference where they could have derived a measure of help from evidence. Not unnaturally the defendant has emphasised the lack of evidence and has submitted that no court may rest its judgment on speculation.

The trial judge awarded the plaintiff $75,000 general damages and an agreed sum of $500 special damages. He ordered what he called (quite wrongly, as the Federal Court has pointed out) "usual" interest of 6% on the general damages to run from date of service of writ; he awarded 3% interest on the special damages from date of accident.

The plaintiff appealed against the award of general damages. After notice of appeal the trial judge produced in writing his grounds of judgment. His findings of fact are of crucial importance and need to be set out in his own language. They were:—

> "It was obvious from the evidence adduced that the second plaintiff has suffered very serious brain injury which has turned her into a sub-normal child with permanent mental and physical disabilities. I was satisfied that before the accident she was a normal child with all the expectations of a normal life. The accident caused mental retardation resulting, *inter alia*, in her inability to control her bladder and bowel movements and to benefit from a normal education. It was in evidence that her span of life would be normal and that she would have to be cared for all her life."

He refused to accept the submission of plaintiff's counsel that in assessing damages he should make separate awards in respect of the three heads of damage and loss which he recognised it was his duty to take into account, namely:—

(1) pain and suffering and loss of amenities;
(2) prospective loss of earnings;
(3) cost of future care ("nursing services" was counsel's term).

In other words, the judge refused to itemise his award. He gave as his reason that:—

"The trend of the local [i.e. Malaysian and Singaporean as distinct from English] authorities ... did not admit of such separate awards in the case of children whose earning capacity was not known and where no evidence was adduced to show that outside nursing care was required."

On appeal to the Federal Court, Raja Azlan Shah, Chief Justice, Malaya, delivered the judgment of the Court. He rejected the trial judge's view that the trend of "local" authority was towards global awards in cases of this sort. He referred to *Murtadza bin Mohamed Hassan* v. *Chong Swee Pian*[1].

Judgment was given by the Federal Court in that case after the trial judge's decision in the present case. By its judgment the Federal Court (Raja Azlan Shah, C.J. (Malaya), was a member of the Court) made it plain that in Malaysia, as in England, it is necessary for the court in a personal injury case where there is an element of future loss or damage to itemise its award, i.e. to make a separate assessment under each head of loss or damage. In the present case the Federal Court has followed its own decision in *Murtadza's* case.

The Federal Court itemised the damages under the headings which the trial judge had recognised as appropriate. Their assessment was as follows:–

(1) pain, suffering and loss of amenities,	$ 70,000
(2) loss of future earnings,	$ 33,816
(3) cost of future care	$ 25,362
	$129,178

The Court used the total as "an indication" of the adequacy, or otherwise, of the trial judge's award of $75,000 and reached the conclusion that his award was so inadequate that they must substitute their assessment for his. They awarded interest under the first head, but not under heads (2) and (3). They pointed out that the interest ordered by the judge to run from service of writ on the general damages he awarded was wrong in law in that the award contained an unspecified amount (for he refused to itemise) in respect of future loss, which does not attract interest: *Cookson* v. *Knowles*[2]

The appellant's counsel developed in his submissions to the Board a wide-ranging attack upon the judgment of the Federal Court, which, he said, represented not the law of Malaysia but the law of England. His general submission was that the Federal Court had erred in law in following English authorities. He referred to section 3 of the Civil Law Act 1956, the effect of which is that developments in English law after the dates specified in the section do not in themselves form part of Malaysian law. In his supplemental case he put it shortly:–

"... the English authorities do not apply in Malaysia."

The importance of the submission is that the Federal Court accepted the guidance of the House of Lords in the English case of *Lim Poh Choo* v. *Camden and Islington Area Health Authority*[3]. By so doing, they incorporated the principle of itemisation of damages in personal injury cases into Malaysian law, subject only to appeal to His Majesty the Yang di-Pertuan Agong.

Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so. The Federal Court is well placed to decide whether and to what extent the guidance of modern English authority should be accepted. On appeal the Judicial Committee would ordinarily accept the view of the Federal Court as to the persuasiveness of modern English case law in the circumstances of the States of Malaysia, unless it could be demonstrated that the Federal Court had overlooked or misconstrued some statutory provision or had committed some error of legal principle recognised and accepted in Malaysia.

It is, therefore, necessary to see whether, as submitted by counsel for the appellant, the Federal Court fell into any such fundamental error in deciding to adopt the *Lim Poh Choo* approach to the assessment of damages in a case of grave personal injury to an infant plaintiff whose normal life span had not been shortened but whose capacity to fend for herself had been destroyed. This task necessitates a review in some detail of the various criticisms made by counsel of the Court's reasoning. He made these submissions:–

(1) that, as a matter of Malaysian law, it is wrong to itemise an award of damages in personal injury cases:

(2) that in the case of an infant plaintiff loss of future earnings is too speculative to qualify for an award of damages and that such a loss should not, in Malaysian law, be accepted as recoverable: alternatively, that in the present case there is no evidence of any such loss:

(3) that there is no acceptable evidence of any need for nursing services or any paid care in the future.

(1) *Itemisation of damages.*

Counsel based his submissions on the difference between the English and Malaysian statute law relating to interest payable on an award of damages. Whereas English law makes itemisation necessary, Malaysian law in his submission does not. There is a difference between the two laws but in their Lordships' view it is not material. Section 11 of the Civil Law Act 1956 of Malaysia is in substantially the same terms as section 3(1) of the English Law Reform (Miscellaneous Provisions) Act 1934. Both statutes confer a discretion upon the court to order interest on an award of damages. English law, however, contains an additional provision which is not found in Malaysian law. Section 22 of the Administration of Justice Act 1969 has amended section 3 of the 1934 Act by adding provisions to the effect that a court in a personal injury case where damages exceed £200 shall exercise its power to order interest so as to include interest "on those damages or on such part of them as the court considers appropriate", unless there are special reasons why no interest should be given: section 3(1A) of the 1934 Act.

Clearly the English statute requires, or at the very least strongly encourages, itemisation of damages in personal injury cases, so that interest appropriate to each head of damage may be ordered: section 3(1A) and (1B) of the 1934 Act. Though no such requirement exists in Malaysia, the written law certainly does not forbid or prevent differentiation in the period or rate of interest as appropriate between the different heads of loss or damage suffered by a plaintiff. Nor does the written law forbid the Courts to adopt the itemisation process in assessing damages. The courts of Malaysia are free to take their own course. The Federal Court was not, therefore, prevented by the written law of Malaysia from using the itemisation process in the assessment of damages for personal injury. Their Lordships reject the submission that in so doing the Federal Court was guilty of any error of law.

(2) *Loss of future earnings.*

The appellant's first point is a question of law. It is that in the case of an infant plaintiff the loss is so speculative that it ought not to be considered in the assessment of damages.

Counsel relied on passages to be found in the speeches of Lord Wilberforce and Lord Salmon in *Pickett* v. *British Rail Engineering Ltd.*[4] In that case the House of Lords decided that an adult wage-earner whose expectation of life had been shortened by the injuries which he had sustained was entitled to recover damages for loss of earnings which he would have had, if he had lived. It was a "lost years" case. Lord Wilberforce (page 150D/E), after giving his view that to allow such damages created no insoluble problems of assessment in the case of an adult plaintiff, had this to say in respect of children and adolescents

> "In that of a young child (cf. *Benham* v. *Gambling*[5]) neither present nor future earnings could enter into the matter: in the more difficult case of adolescents just embarking upon the process of earning (cf. *Skelton* v. *Collins*[6]) the value of "lost" earnings might be real but would probably be assessable as small."

In their Lordships' view Lord Wilberforce was directing his attention to the process of assessing a child's loss of future earnings in cases in which the child does not survive, i.e. in a "lost years" case. His comment was not directed to a case such as the present where the infant plaintiff is expected to live for her normal span or, at the very least, for a substantial number of years.

Lord Salmon also adverted to the problem in his speech in *Pickett's* case. He said (page 156E) of *Benham* v. *Gambling* that:–

> "Not surprisingly, no claim was made for damages in respect of the earnings that [the] infant might have lost because such damages could only have been minimal."

He also was considering the point in the context of a "lost years" case.

When one turns to consider the case law where the plaintiff survives, one finds that the courts have recognised that such damages are recoverable. In *Tan Chwee Lian* v. *Lee Ban Soon*[7] the Court of Appeal of Singapore, in a case of a girl aged 9 years, awarded damages for loss of future earnings. The girl was "for all practical purposes, unemployable and her chances of marriage were virtually non-existent" (page 150).

In *Croke* v. *Wiseman*[8] the English Court of Appeal held (Lord Denning M.R. dissenting) that a gravely injured child of 21 months, who was expected to live for many years into adult life, was entitled to damages for loss of future earnings during his period of likely survival. Such loss was not to be treated as being so speculative that it could not be assessed. In the course of his judgment Griffiths L.J. distinguished the case of a plaintiff who was expected to live from the "lost years" cases and made a comment, with which their Lordships wholly agree: he said (page 862) that in the case of a gravely injured child "there are compelling special reasons why a sum of money should be awarded for his future loss of earnings". Shaw L.J., agreeing with Griffiths L.J., refused to accept that there should be any difference of principle between a child plaintiff and an adult plaintiff (page 863). In effect, the Court of Appeal applied the principles enumerated by the House of Lords in *Lim Poh Choo's* case *(supra),* which was one of an adult plaintiff, to the case of an infant plaintiff. And in *Joyce* v. *Yeomans*[9] which was decided some ten months earlier, the English Court of Appeal upheld the right of a ten year old boy, who had sustained a grave head injury, to damages for loss of future earning capacity.

Finally, the Federal Court has in the present case taken the same view. Their Lordships would hold that in so doing the Court was accepting and applying the correct principle. If damages are to be a fair and adequate compensation for a plaintiff who is expected to live for many years during which time he will be unemployable or his earning capacity substantially reduced, it will be necessary to assess his future loss, difficult though the task may be in cases where the victim is a child. Though difficult, the court must do the best it can upon the evidence.

In the present case (this is the appellant's second point) it is said that there is no evidence. But the Federal Court has demonstrated by its judgment that there is enough evidence to reach a reasonable, and certainly a not excessive, estimate. There is clear evidence of the physical and mental consequences of an injury, which has converted a normal happy intelligent child into a person who will for the duration of her life be unemployable, and a burden on her family and friends. The Federal Court, using its knowledge of Malaysian circumstances, estimated, in today's money, the sort of earnings she could reasonably expect, without any special qualifications or skills, to earn; and the appellant's counsel does not challenge their figures. While it would have helped the court to have had evidence as to the present family and social circumstances, since it might have shown that this little girl had better prospects than average, any evidence given as to her future prospects would be as much a matter of inference and estimate as is the judgment of the court without such evidence. The reality is that in most cases the court must form its estimate based upon its own knowledge of social conditions and upon evidence (which was available from the doctor and the school) of the present and past circumstances of the plaintiff. Their Lordships, therefore, reject the submission that the Federal Court was wrong to allow loss of future earnings into their assessment of the plaintiff's damages. And their Lordships are satisfied that the Federal Court reached a reasonable estimate of the loss.

(3) *Cost of future care.*

The appellant accepts that this is an element in damages for personal injury provided always that there is evidence that care will be necessary. Their Lordships need say no more than that the findings of the trial judge, fully justified as they were by the medical evidence, strongly support the inference drawn by the Federal Court that there would be a continuing need for care, including nursing services. The Federal Court, using its local knowledge, estimated a reasonable figure in terms of current money; they applied an appropriate multiplier and gave effect to all necessary discounts. Their Lordships, therefore, reject the criticisms made of the Federal Court's judgment.

Their Lordships cannot leave this case without commenting on two unsatisfactory features. First, there is the inordinate length of time which has elapsed between service of the writ in February 1977 and final disposal of the case in the early months of 1984. The second is that, as their Lordships understand the position, no power exists in a case where liability is admitted for an interim payment to be ordered pending a final decision on quantum of damages. These are matters to which consideration should be given. They are, of course, linked: though the remedy for delay may be a matter of judicial administration, it would seem legislation may be needed to enable an interim award to be made.

To conclude, their Lordships have no doubt

that the Federal Court was fully entitled to accept the principles of assessment laid down by the House of Lords in *Lim Poh Choo's* case. Their Lordships agree with the Federal Court in their view that the assessment of damage under separate heads is necessary in a case such as the present in order to achieve a fair and adequate compensation. Their Lordships do not doubt that this has been achieved by the Federal Court. Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Philip Conway Thomas & Co.; Charles Russell & Co.*

OOI BOON LEONG & ORS. v. CITIBANK N.A.

[P.C. (Lord Fraser of Tullybelton, Lord Edmund-Davies, Lord Keith of Kinkel, Lord Brightman & Lord Templeman) January 23 to 25 & February 15, 1984]

[Privy Council Appeal No. 42 of 1981]

Contract – Guarantee – Whether parties can contract out of provisions of Contracts Act which define circumstances in which a surety is discharged from his obligations to the creditor – Whether omissions on part of the creditor discharged guarantors from their liabilities – Contracts Act, 1950, ss. 1(2), 2, 86, 92 & 94.

Practice & Procedure – Action on contract of guarantee – Whether action suitable for summary disposal under Order 14 – R.S.C. 1957, O. 14.

In this case the respondent bank had sued the appellants on a contract of guarantee for banking accommodation given to a company. The appellants were the directors of the company and in the contract of guarantee they had agreed to waive their rights in respect of any variation or alteration of the contract between the respondent bank and the company. The advances were not repaid and the respondent bank sued the appellants. The respondent bank applied for summary judgment under Order 14 of the Rules of the Supreme Court. The Assistant Registrar made an order in terms but this order was reversed in the High Court. The appellants had contended that their liabilities under the guarantee were conditional on the respondent bank securing certain acts on the part of the company, the directors and the shareholders. Such acts were not stated in the guarantee but were stated in a letter which set out the terms and conditions of the cases. The appellants relied on the fact that the respondent bank had not obtained (a) a valid debenture on the company's assets containing a provision to enable receivers to be appointed in the event of default; (b) a letter of undertaking from the shareholders who held 40% of the issued share capital not to divest their shareholdings without the bank's consent The Federal Court allowed the appeal of the respondent bank against the order of the High Court – See [1981] 1 M.L.J. 282. The appellants appealed.

The appellants conceded that in the absence of the Contracts Act, 1950, Clauses 7(5), 8 and 16 of the guarantee would prevent the appellants being discharged from the liability by the omissions of which they complain. Two questions therefore arose. First whether those clauses of the guarantee were valid or whether they were void because parties could not contract out of the sections of the Contracts Act, sections 86, 92 and 94. Secondly if parties cannot contract out, whether such omissions on the part of the respondent bank were matters which discharged the appellants from their liabilities upon the true construction of the sections of the Contracts Act referred to.

Held, (1) if freedom to contract is to be curtailed in relation to a particular subject matter, the prohibition should be expressed in the statute and not left by the legislature to be picked out as an implication based upon sections dealing with different subject matters. When the Contracts Act intends to render an agreement void it says so in express terms as in sections 25 to 31;

(2) the clauses in the guarantee are therefore valid and it becomes unnecessary to decide whether the appellants would have been discharged under all or any of the sections of the Contracts Act relied on by the appellants assuming that the clauses of the guarantee relied upon by the respondent bank are void. It is doubtful however whether it can properly be said that the omission from the debenture of a power to sell out of court was a variance of the agreement by the company to grant a fixed and floating charge within the meaning of section 86 of the Contracts Act relied on by the appellants, and whether in the terms of the Act the appellants would have been discharged by the omission of the respondent bank to obtain the undertakings called for by the Letters of Agreement;

(3) the action was not suitable for summary disposal under Order 14 since the defence did raise matters for serious arguments. The issues could more appropriately have been decided without the expense of a full trial with witnesses, by way of the hearing of a preliminary issue. However it would not be appropriate for the appellants to be given leave to defend, since a decision has been reached on the merits of the defence and nothing remains to be tried.

Cases referred to:

(1) *Sheikh Mahamad Ravuther* v. *British India Steam Navigation Company Limited* (1908) 32 I.L.R. Madras 95.

(2) *K.R. Chitguppi & Co.* v. *Vinayak Kashinath Khadilkar* A.I.R. 1921 Bom. 164.

(3) *Lakhaji Dollaji & Co* v. *Boorugu* A.I.R. 1939 Bom. 101.

(4) *Irrawaddy Flotilla Company* v. *Bugwandass* (1890) 18 I.A. 121

PRIVY COUNCIL APPEAL FROM MALAYSIA.

T.L.G. Cullen Q.C. (*Miss Choi Yok Hong* with him) for the appellants.